92-442

Supreme Court, U.S.
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No...

IN THE

SUPREME COURT

of the

UNITED STATES OF AMERICA

March term 1992

DOUGLAS J. MICHELSON,

petitioner,

vs

COMMISSIONER OF INTERNAL REVENUE,

respondent,

Petition for Writ of Certiorari
to the United States Court of
Appeals for the Tenth Circuit

APPENDIX B

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

RECONSIDERATION BRIEF IN CHIEF

is included here in order to understand references in the petition for certiorari, and to understand the points which were at issue but the Court of Appeals would not address, or addressed inadequately.

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STATEMENT OF THE CASE

Appellant-Petitioner, Douglas J. Michelson (referred hereinafter as Michelson) started his effort to be in the metal business full time in 1978. In 1978, deliverable in August 1980, he entered a great number of the contracts in dispute in this case. He focused on the niche of a wholesale metal dealer, who bought or sold metal from his inventory. In early 1979 he sold copper and silver. The $460,050 in business on his books by April 1979 would have required filing a schedule c. The interceding event which ruined his business and sapped his working capital was the creation of a corner in the

silver market by Hunt, etal.It occurred from Sept 1979 till April 1980. Michelson took action switching delivery dates forward in December 1979. He filed his 1979 return April 1980. M L sued him. Congress in May 1980 went public with hearings on the silver market, providing the names and details of the major conspirators in the corner. Michelson during 1980 did $733,050 in metal sales. In April 1981 he filed the 1980 tax return. In 1983 Michelson sued Hunt,et al. All books and records which IRS requested were immediately provided them. On April 3,1984 a notice of deficiency was issued on two years. June 12, 1984 a petition was filed in Tax Court. IRS Notice recategorizes him out of the metal business. They identified his losses brought on by the corner in the market as

sham straddles and disallowed them. They disallow expense deductions per section 162, and NOL carryback per section 172. They disallow 1980 hedging losses for 1980, and claim they are subject to recovery. From 1976 till 1981 Merrill lynch and others had promoted tax avoidance by the use of straddles. By 1984 Congress decided to act to clarify to clarify where all the commodity dealers were on the IRS carpet, as well as anyone who had done commodity futures transactions. That is enshrined in the legislation detailed in point 3. The Tax Court had made several rulings favorable (Swan and Fox),to the theory under which the Notices were issued. In 1985 **Miller, Gilbert,v CIR** issued en banc by the Tax Court adhered to the Congressional mandate and overrode two previous cases.

It was suppose to put a stop to the IRS hauling the commodity dealers into court for transactions prior to 1982. Michelson has tried everything to communicate with IRS, and resolve this suit, and with the Court to set it up for a proper ruling. The court would not take proper action on critical motions. The trial went forward with its bad proceedings which this court can read in the record. After trial, briefs were submitted. Another month passed, and Michelson wrote letters to the court requesting immediate rulings on all things. Two years pass with more unanswered letters. In 1988 the Supreme Court decided a case called Arkansas Best. IRS has since latched on to it as a way to argue. In 1991 Judge Parker rules for IRS on all issues. Michelson hires counsel at a huge prepaid fee, to leave

no stone unturned. The lawyer does little and files an unhelpful brief and then he casts terribie aspersions on me filing a motion to withdraw, and miscommunicates more. Your honors move on your busy calendar. I am unable to know what is going on. Three weeks after ruling he sends it in the mail. I file an appearance to save this miscarriage of justice.

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*SUGGESTED FOR EN BANC CONSIDERATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DOUGLAS J. MICHELSON,)
Petitioner-Appellant,)
)
v.
no 90-9020
COMMISSIONER OF INTERNAL REVENUE,)
Respondent-Appellee.)

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT
TAX COURT NUMBERS 8130-82, 18686-84 AND
16775-85

D.J. Michelson, Albuquerque, New Mexico on the brief for reconsideration and en banc hearing for petitioner-appellant.

Shirley D. Petereson, Assistant Attorney General , And Gary R. Allen, Kenneth L. Greene, and Steven W. Parks, Department of Justice, Washington, D.C. for respondent- Appellee.

Before MCKAY, Chief Judge and BARRETT and BRORBY, Circuit Judges.

BRIEF ON POINTS FOR RECONSIDERATION

OR EN BANC HEARING

-Point 1-

Corn Products Refining co vs CIR 1955, 350 US 46, 76 s ct 20 110 led 29 and Monfort v US (1977) ca 10, 561 f2d 190, attg (a976), 406 f supp 701, governs consideration in the 10th Circuit of whether the transactions herein were

speculative in the context of a commodity dealer.

Since the tax court ruling and initial affirmation obscures that or overrides it as precedent, rehearing should be en banc.--- US v Lewis ca La 1972 475 f2d 571 rehearing denied 472 f2d 1405. Because Judge Parker does not follow precedent from this case and in other cases and areas of exceptional importance, reconsideration addressing them properly is in order.--- CIR v Textile Mill Security corp CA 3 1944, 117f2d 62, affirmed 62 s ct. 272, 314 US 326, 86 led 249 For additional reasons stated in the rehearing and en banc motion, rehearing is necessary and en banc preferable.

Monfort also governs treatment of hedging contracts which becomes part of costs of goods sold because delivery is

not made or taken under a contract made on a recognized commodity exchange. These would normally be lumped together under hedging, an adjustment to costs of goods sold. It would also cover the burden to be properly placed on IRS for recategorization of inventory transactions already chosen pursuant to the code. Tax law in 1968 existent for the MONFORT case was nearer 1979 tax law, than the tax law after 1982 seen misapplied herein. It was the law of the case for this circuit herein. It was the case law relied on in 1979 and at trial.

Expert economist, Dr. Teweles, at trial testified that in his opinion based on his experience, education and investigation," Michelson was a dealer acting in good faith."(t-245) and the transactions within the context given were anticipatory hedges.(t-245) His

investigation showed that there was no speculative trades in the account as he found no other commodities such as soybeans in the metal business, or too large a position. Anticipatory hedges are one of the most used commercial methods in the markets, and was common trade practice. IRS has no expert to rely upon to rebut the testimony. Nor are the underlying facts controvertible. pg30 (569) of Judge Parker's opinion incorrectly holds "petitioner was gambling". This Court must correct the conflict seen and conform it to what she has taken judicial notice of under the law (CEA sec 2 (a)(1)(a) . Michelson was engaged in the buying and selling of a commodity on a board of trade. see also CEA sec 3.

That the expert testimony of Dr. Teweles and Mr. Marron is correct is

enhanced in probability in the trial setting because IRS did not present an expert to controvert. Thus the meager burden of more likely than not which the trial court was required to find under easily must find for petitioner on the evidence.

Post trial briefing brought this to the lower Courts attention, suggesting that no expert testified because none would contradict from the facts given. Judge Parker, ignored this and this Court should enforce proper inference to their lack of expert. Ruling that the evidence proved Michelson was a dealer is necessary. It is not Dr. Teweles opinion alone that is very persuasive, but all the evidence seems to be in support.

The ultimate findings of fact as stated in the judgment are stated in the negative and thus very hard or impossible

to prove, in addition to being unsupported by any evidence rightly weighted. They are improperly formed for ruling in this situation. While asserting certain transactions in the business were speculative is within the authority of IRS, per Monfort, to exclude Michelson by law from being a dealer is not, Traux.

The burden to show this reviewing Court that error was made is what would convince a person a mistake had been made, taking what is favorable to the prevailing party below. First look to those errors of law and then to the bias and procedural abuse and trial prejudice and the objective and subjective evaluations of critical facts and a reasonable conclusion is that a mistake was made in the lower court in judging a situation that was not much of taxpayers making. However, it was the risk of

being in that business during that time and he should receive treatment in accord with that as other metal business's did. In the court below the burden of proof on issues is the same as a civil suit tried to the bench in the First Circuit. For most issues it would be more probable than not or a preponderance of the evidence. Wigmore on Evidence #2494. Since within the trial setting petitioner was not given a fair trial or an unbiased Judge, the reviewing court must consider some of the record as it would have been absent the inadmissible and other erroneous rulings and abuse from the bench, if they are. Because the truly weighty issue are errors of law or misapplication, and the proper standard there is de novo, most in the record can be weighted in the discretion of the Court, more probable than not an error

was made, rather than the facts clearly erroneous standard calling for a scintilla of support. Wrong citation by prior counsel is pointed out. That does not mean that it is not still a tax case, and the consideration that holds, or that the trial judge deserves deference. But because much is question of law on issues overruling precedent in this circuit or where there is intercircuit need of husbanding the law, or new consideration on Supreme Court law as applied to this area it all can be reheard en banc on the issues presented in the brief as if no prior hearing was had. Because of the malpractice of the former attorneys appearing for petitioner-appellant this reconsideration is fair. --- Sparks v. Duval County Ranch co.Inc. CA TEX 1979 604 f2d 976 aff'd more cite in ref.

If the lower court judge was unhappy with Dr. Tewles she could have relied on Mr. Marron, an expert at assessing within the tax code whether the transactions were speculative or he was a dealer. She ignored his expert opinion on everything also. Mr. Marron testified Michelson was a dealer and the transactions were proper within the year taken. He testified he had a metal inventory of about $940,377 dollars, and kept it on a LIFO basis.(t-317,358) She can't brush him off as not being qualified to judge it within the tax code, or knowing the parameters of the business, or taking the time to investigate, or having a professional relationship for 20 years, as she does Dr. Teweles, in inserting her view for what was necessary for experts to have done. The record shows a conjured up mistrust of experts to suit the Judge's

subagenda. ALL the witnesses and documents which uncontrovertedly and conclusively show he was a metal dealer should control the fact result.

However the law must control whether it was a proper prerogative of Michelson to enter the metal business or if IRS can deny petitioner that right, as herein is being done. The evidence necessary to show that he did sufficient to be engaged in that business must be weighed as the right of a farmer or merchant would be. It has been addressed in ---Faulconer v. CIR 748 f2d 890,895 4th cir (1984)Nickerson v CIR 700 f2d 402 in a circumstance where there are implied ulterior motives. What they are here I don't know. In Nickerson and Faulconer, and other cases under sec 162, which is applicable here, uniform standard are used in assessing if it were a trade or

business. Under those criteria it would be overwhelmingly seen as a trade or business. For brevities sake we do not extend the brief with further analysis, but refer the court to the criteria list in the cite, and the record. Judge Parker should have used recognized criteria rather than off the wall generalizations like he had no customers. Since the issue was not properly cast in terms of if specific transactions were speculative, it must fail.

Weiler v CIR, 187 f2d 744 other authority under Corn Products Refining Co.v Cir (1955),350 US 46, 76 s ct 20, 110 led 29 was relied upon because of its special application to the parallel situation and issue wherein one is damaged in a disrupted market, if those losses would be ordinary to that years business. They would. The trial court

ignored proper authority and this court must reverse.

Michelson did all he could to save himself from the manipulation, consistent with honoring his obligation to deliver metal under the contract. Clearly this Court misapprehended the situation and was led to believe that the losses arose other than from a manipulated market, as expert testimony said, and Judicial notice concluded. Evidence shows that they cannot have arisen from speculative investor undertaking as IRS 's attorney conjecture. Findings from attorney conjecture are clearly erroneous.(see lack of transcript reference in support)

Monfort from this circuit, correctly suggests deducting closed contracts not resulting in delivery, from costs of goods sold, as Michelson did herein. What authority does IRS rely on for

recatagorization of the LIFO inventory method, which they have admitted taxpayer used. NONE. It was their burden given contrary LIFO admissions in the answer to proceed. IRS in Monfort offered expert tax accounting testimony. Here they failed to rebut same. Again, as a matter of law, the IRS's notice recatagorizing Michelson adjustments to cost of goods sold treatment of the loss transactions must be clear and persuasively supported at trial. It was neither. It was not correct. Incorrectly the Judge picks up from attorney conjecture "Petitioner's short positions in silver could not guarantee him a minimum sales price since he had no silver to sell;.."pg 28 (567) This is not evidence that the transactions were not anticipatory hedges, nor is it supported in CEA or contract law. It will not overcome the

truth and expert reasoning on anticipatory hedging given by Dr. Teweles. Conjecture will not overcome testimony that it was hedging done according to the rules of the CEA, or trade practice which was judicially noticed. At pg 6 (545) she cannot ignore established trade practice and regulation that is persuasive on the issue and would be in conformity of treatment of taxpayer under the law, saying " it is not determinative of the tax issues before this court." She must look to evidence deemed reliable by case law, by the expert,--- In re Japanese Electronic pdt Lit 723 f2d 238, 3rd cir 1983 (rev on other grds.) and which would result in fair treatment of the taxpayer before the different parts of government. Because it is such a specialized area she should have heeded Dr. Teweles unbiased

opinion.(---see Shad v Dean Witter Reynolds 799 f2d 525, 530, 9th(1986)- see point 10-) She did none of these. She must as the trier of fact look to the evidence of record and the implication of conclusiveness see therein. Since the scheme argument was unclear and was unsupported at trial by evidence it must fail first by the legal error in proper application of the law and only incidentally as a matter of evidence. No expert would testify that there were no other dealers using anticipatory hedges in silver to set a price for silver. Also only part of the transactions disallowed were claimed to be anticipatory hedges by Michelson. He showed that those in gold were hedged versus inventory. We think this court misapprehended that situation seeing the transactions as all in

silver, and were speculative, and caused as part of a "tax avoidance" scheme.

Judge Parker's sweeping Michelson's profit and loss statement, general, and subsidiary ledgers, and other business documents under the rug in her footnotes pg8 (558) can not be the treatment it deserves in a court of law. The presumption that the taxpayer has acted correctly in maintaining proper books and records, was improperly ignored. She ignored IRS admissions in the answer--- Auto Owners Ins co v (see -Point 7- below) and Marron, a Harvard tax lawyer and CPA testifying as an tax law expert and accounting expert said that petitioner's books and records included a proper profit and loss statement, inventory records, etc, and were more than adequate ledgers for a small business. He testified how the treatment

as an adjustment to costs of goods sold was the best method, even in these unusual circumstances. This is more persuasive than the treatment found unsupported in Judge Parker's footnote pg 19 (558). It was proven to be according to general accounting principles consistently applied not "as a matter of mechanics". That coupled with petitioner's own testimony is more evidence than needed to shift the issue of recatagorization to the governments burden. What testimony supports IRS? Do they contend that the books and records were improper? Just saying petitioner prepared the profit and loss statement and kept the books and records which the CPA used in preparing the tax return, does not make them wrong. Every small business does it in that fashion. The burden was upon IRS to show that the

inventory record was incorrect and they did not meet it. They should lose the issue therefore,---see Baltimore Dairylunch ,inc vs US 8th cir, 231 f2d 870, because the burden had shifted upon a proper consideration of the evidence taken as whole. The Judge addressed this procedure in Monfort and Judge Parker was required to address it similarly.

Using the document LIFO Inventory ledger to determine that some of the inventory was "held that metal for rather long period of time, two years or more," pg25 (564).This does not transform it from metal in inventory to capital assets. It clearly fits all three parts of the literal words of the code exception. It was (1)stock in trade, (2) of a kind which would properly be in an inventory and (3) for sale to customers in the ordinary course. If finding two

year old inventory in a LIFO inventory record transforms it to capital assets, any LIFO inventory record in the metal business would show that the oldest inventory was older than two years. Congress recognized and nurtured an exchange market for the expressed purpose of facilitating commerce by providing a niche for those taking mine and refinery output and holding it for some time to allow demand to catch up and mines and refineries to operate at level capacity, and so producers had immediate customers. She ignores this from the record (t-367) . And if showing that two year old inventory becomes a capital asset in the hands of the taxpayer, they were required to show it through an expert witness, not from the faithful bias of the JUDGE working for them.--- Davis & Cox v Summa

corp 751 f2d 1507, 1511, 9th (1985) This was not harmless error.

Starting in 1981, till 1986, the law around commodity exchange contracts was in a state of change. The agents and the lawyers for the IRS have herein consistently misapplied these changes to the appellant's 1979 tax return. The court must look at the word of the law for the year in which the return is filed. It must conform to that law alone.

-Point 2-

Does deletion of certain transactions of the same nature as other transactions, impermissiblely infringe the Supreme Court doctrine, prohibiting the splitting up of taxpayers transactions to increase or find a tax? -- --Gregory v Helvering 1935 , 293 US 465 , 55 s ct. 2??, 6 led 596.

It is unquestionable that the IRS in its NOTICE takes certain transactions in 1979 and disallows them in that year but then turns around and allows them in 1980. (notice pg 6 &7.) It is unquestionable that those removed were done in the ordinary course and not materially different from those it did not remove. Removing $304,895 in hedging losses from the taxpayers business for the year in which they occurred is wrong under the above doctrine. It only purpose is to increase the 1979 income and find more tax.

What is shown on the ex." 1", reproduced from pg14(553), for the straddle discussion following and here <u>DOES NOT SHOW</u> all the other transactions in petitioners business. Omitting the $460,050 referenced in the footnote on pg19(558) or $788,304 in 1980

transactions or business of petitioner, or over 58 other transactions and then on pg7 (542) finding that the" 1,000 pages of transcript is singularly devoid of any information as to petitioner's alleged transactions in metal, other than the few transactions on the commodity exchange that resulted in the large losses claimed on his 1979 and 1980 tax return, which are the subject of this lawsuit", is totally incorrect and inconsistent and misleading. We think the reviewing court may be mislead or misapprehended the situation.

The $ 1,303,405 taken away from 1980 was no different from the $788,304 in sales of metal in the business. Proper accounting treatment placed it there as consistent with prior years, the case law, trade practice, accounting practice and a since of fairness in the situation.

Date of Contract	Price Per Troy Oz.	(Proceeds to be received for delivering 5,000 oz.)	Date Closed Out (by offset)	Price Per Troy Oz. to Close Out	Amount to Close Out Position (Price x 5,000 Oz.)	Loss on Transaction*
11-16-78	$ 6.9200	$ 34,600	12-28-79	$29.7220	$148,610	($114,010)
11-17-78	6.9900	34,950	12-31-79	30.8420	154,210	(119,260)
11-17-78	6.9900	34,950	01-10-80	36.8000	184,000	(149,050)
11-30-78	6.1300	30,650	04-16-79	7.2900	36,450	(5,800)
11-30-78	6.1500	30,750	05-25-79	8.8350	44,175	(13,425)
01-22-79	7.4300	37,150	01-10-80	37.2500	186,250	(149,100)
01-25-79	7.6800	38,400	01-02-80	32.9940	164,970	(126,570)
02-07-79	8.6480	43,240	01-03-80	35.1740	175,870	(132,630)
05-01-79	9.7000	48,500	01-10-80	39.5000	197,500	(149,000)
08-08-79	11.1500	55,750	01-10-80	40.7690	203,845	(148,095)
08-31-79	10.4950	52,475	12-04-79	19.5500	97,750	(45,275)
11-27-79	21.6000	108,000	01-10-80	41.1650	205,825	(97,825)**
12-10-79	23.4500	117,250	01-10-80	40.3720	201,860	(84,610)
12-31-79	32.3720	161,860	01-10-80	38.2000	191,000	(29,140)
12-31-79	31.1720	155,860	01-10-80	38.2000	191,000	(35,140)
01-02-80	33.9740	169,870	01-10-80	38.6500	193,250	(23,380)
01-03-80	34.0940	170,470	01-10-80	37.7500	188,750	(18,280)

*Petitioner on his tax returns computed the losses resulting from the contracts closed in 1979 exclusive of broker's commissions and fees, but computed the losses resulting from the contracts closed in 1980 inclusive of those commissions and fees. For consistency, the Court has listed all of them exclusive of those expense items.

**Petitioner failed to claim this loss on his 1980 tax return, but if petitioner otherwise prevails, respondent agrees that loss should be allowed.

EX X-1

It was admittedly oversized for hedging adjustment in relation to sales. However that was not of the taxpayers doing, but of the actions of bad business practice in the market- monopolization. Dealers in that market lost millions, many were crippled, etc. All took similar transactions in the ordinary course of their business. All were oversized. The suggestion that it was loss under section 165 as a casualty loss is out of place. Other people filed suits. None of them were shifted about as here, disallowing those transactions in their business because of recovery. It is recatagorization , without reason, reality or case law providing some logic to be more persuasive than petitioners case law (Weiler), expert testimony (were correct), Congressional report, (judicial notice) and presumptions(

ordinary course). It is merely an impermissible way to increase petitioner income proscribed by the above doctrine.

Evaluated in the context of the doctrine on splitting up the transaction of a business, the Court must disallow the splitting and therefore accept the returns as filed.

-Point 3-

The following all was raised in the trial briefing and was malpractice for prior counsel not to raise it on appeal for review. Because it is an overruling decision of exceptional importance it deserves en banc review, de novo. And because it even controls if this Court assumes the investor theory, it deserves proper consideration. --

The plain words of the statute convey Congressional intent of the tax

law for the year in which the return is filed, (1979). AND IT WAS NOT FOLLOWED; rather there is clear evidence it was ignored.

Reference the center column, schedule "1", next page, reproduced from pg14(553)., It is used for discussion here and elsewhere. Five listed transactions are closed in 1979, replaced with five new ones closed in 1980. <u>These are straddles.</u> Take special note that three were <u>done in December 1979</u> for comparison to **Miller, Gilbert** below.

Congress in sec. 108 of the Tax Reform act of 1984 when it addressed this particular area of the law in regards to commodity futures contracts specifically worded the statute so that it was clear to those transactions prior to 1982. That

concerns us here. The tax court must follow the literal word of the statute.

(a)General Rule--For purpose of the Internal Code of 1954, in the case of any disposition of one or more positions -- (1) which were entered into before 1982 and form part of a straddle, and (2.) to which the amendments made by title V of the Economic Recovery Tax Act of 1981 do not apply, any loss from the disposition shall be allowed for the taxable year of the disposition if such position is part of a transaction entered into for profit. (b) Presumption that transaction entered into for profit--For purposes of subsection (a) any position held by a commodities dealer or any person regularly engaged in investing in regulated futures contracts shall be rebuttably presumed to be part of a transaction entered into for profit. (Tax Reform Act of 1984, publ l 98-369, sec 108, 98 stat 630).

Treatment of commodity exchange contract losses "before 1982" were continuing to be allowed "for the taxable year of the disposition". That is the plain language of the statute and what taxpayer can expect to happen. Judge Parker was aware of the binding precedent set by the Court en banc

hearing in --- Miller, Gilbert v CIR 1985, 84 TC 55 and inarguably of the effect herein. Much of her trial error and effort was to obscure the precedent, and affect. This court must reverse it.-- CIR v Textile Mill, supra. Michelson was one of those dealers she felt should not be allowed the treatment the law affords. She moves forward on her own and IRS's sub agenda. (What'll we do now, after Miller, Gilbert?)

Congress was clearly aware that there had been some abuses in the use of "silver tax straddles" in years prior to 1982 and addressed them knowing that the IRS cases then before the Tax Court would be effected if the CONGRESS chose to so effect them. It did.(see p842 Miller, Gilbert supra)

This is important to this case because it was started off from the

dragnet operations of the IRS against anyone who dealt in the silver market. Error was made in the trial (t-1003,04,15) when the court would not allow proper cross examination of the IRS agent who made the investigation and prepared the notice, so that this would be clear in the appeal record.--- US v Williams CA tex 1971, 447 f2d 1285 more cite in front) {appellant contends that some cross or examination was required to be allowed and this case law should apply here,although usually reserved to criminal proceedings. } Judge Parker virtually ignored the right to cross or examine, IRS agent and Appeals Officer, witnesses subpoenaed on this point, the notice, the preparation, or anything. Also raised in briefing was the point that the agent did not identify and offer into evidence the Notice, he prepared.

A error was made in the disallowance into evidence at trial of a "switching schedule" (x-2) which showed how the transactions at the end of 1979 were switched into 1980. While this would be a harmless error, since other ways were available and used to address it, it is mentioned because it is especially showing of what was up her sleeve. Me' think' she protest too much. Straddles are usually referred to as a switch for a dealer in metals. The court was required to allow that compilation since the basic documents were admitted. What went on is clearer from a compilation as seen in the switching schedule disallowed. Why was Judge Parker so adamant that the switching schedule not be allowed at all? These were the transactions she said were at issue and arranging them showing how all the

EX X-2

SWITCHING SCHEDULE

ITEM #	DATE	DELIVERY SWITCH	CONTRACT MONTH	$PER OZ.	P&S DATE	PR
1.	11/16/78	TO #13.	DEC 80	6.92	12/28/79	29.72
2.	11/17/78	TO#15	DEC 80	6.99	12/31/79	30.84
2.	11/17/78		DEC 80	6.99		
3.	11/30/78	TO#8.	MAY 79	6.15	5/25/79	8.83
4.	11/30/78	TO #9.	APR 79	6.13	4/16/79	7.29
5.	01/22/79		FEB 81	7.43		
6.	01/25/79	TO #17	APR 81	7.68	1/2/80	32.99
7.	02/07/79	TO#16	AUG 81	8.64	1/3/80	35.17
8.	05/01/79	PREV 3	DEC 81	9.70		
9.	08/06/79	PREV 4	JUN 82	11.15		
10.	08/31/79	T #12	DEC 79	10.49	12/04/79	19.55
11.	11/27/79		AUG 82	21.60		
12.	12/10/79	PREV10	APR 82	23.45		
13.	12/31/79	PREV1	JUN 81	31.17		
14.	12/31/79	PREV 2	JUN 81	32.37	CANCEL	
15.	12/31/79	PREV14	JUN 81	32.37		
16.	01/02/80	PREV 7	AUG 81	33.97		
17.	01/03/80	PREV6	APR 81	34.09		

dealers were meeting the problems of no silver in December is proper. Why were they disallowed? (t-667-9,978) These abuses were intended to obscure from this Court the lack of foundation behind the IRS case and its lack of evidence, as well as to obscure it from case law precedent, or alternative pleading.

Not allowing cross examination here is error of such a magnitude that it can be seen to taint the trial.--- Delaware v. Van Arsdale 475 US 673, 106 s ct. 1431, 89 led 2d 674 (1986) Proper inferences were not allowed to be draw in the case, nor was it properly allowed to show bias in constructing the erroneous notice. Instead there is practiced deceit by the judge about the notice and its admission into evidence , and weight and presumption of it (t-3,25,1002 ,1004)) and her disallowing of evidence bearing

on it and issues within incorrectly treated.

There was specific consideration given in **Miller, Gilbert** for cases who had been NOTICED on 1979 tax year issues. Congress was aware and chose its method of rectifying it. Congress acted and the en banc Tax Court hearing in **Miller, Gilbert**, supra adhered to it.

(p846 of **Miller , Gilbert**) "Applying section 108 to this record we conclude that the losses realized on December 3 and 4, 1979, in which the December 1980 short gold position was disposed of are all allowable...(and continues further down that page.)...On these fact we are constrained by section 108 to find for petitioner notwithstanding the fact that this result is directly contrary to our holding in **Smith and Fox** . It is not, however, for this Court to question the wisdom of the congressional mandate....and concurring on p850...If the practical effect in honoring the clearly expressed will of Congress is to grant amnesty to pre 1981 commodity tax straddlers, so be it. It is certainly not the proper function of this or any other Court to subvert the will of Congress by substituting the personal preferences of the Judges, and the majority prudently has not done so. "

IRS has continued acting herein against the mandate of CONGRESS. IRS upsurps Congress in its actions herein and certainly the JUDGE abuses her discretion in aiding it through erroneous ruling, and bypassing her own Court precedent. None of these actions can be allowed by this Court.see American Menthyl Corp v EPA 749 f2d 826, 242 US app DC 148, appeal after remand;(at p833 on an agencies interpretations after Congress addressed the issue.)

Congress intended in 1982, to effect those cases which IRS had--acted wrongly on--and put the issue to rest. Taxpayers would no longer be pursued by the IRS disallowing commodity exchange contract losses in silver for 1979 and any year prior to 1982. It applying it,it would make no difference to say that this is applicable to silver straddles only,

because it is the application of commodity exchange contract losses fully against ordinary income, in the year of disposition per the logic on p843 of the en banc decision and the fact that those transaction were in gold would not matter. <u>This action of CONGRESS was decisive on all issue then at issue in the case.</u>

Judge Parker of the tax court was incensed at the free ride given the commodity dealers, ignored Congress and the tax court precedent. Both are error reversible by this court. She was part of a strongly worded dissent. She felt that:

> ..."The real significance of the issue to be decided by the court today can be illustrated by figures contained in the congressional debate; reportedly , notices of deficiency have been issued in 15,000 cases involving tax straddles and deficiencies of $1.5 billion. 11 Cong Rec. s 8390 (daily ed June 27,1984) and 12 Cong. Rec. E3251-E3252 (daily ed July 24, 1984) By the enactment of section 108 of the Tax Reform act of 1984, Congress

has clearly indicated that tax relief is to be extended to dealer in tax straddles at a cost of over $300 million in revenue." pg850 Miller,Gilbert.

IRS continued the abuse of taxpayer Michelson, herein and possibly others. Michelson was one of those 15,000 dragnetted into court. He was the hapless victim of a corner disrupting his business. And now is ensnarled in-between IRS and Congress and the Tax Court desperately trying to get out. Herein the abuse is seen in the record wherein Judge Parker ignored pretrial motions which would have led to summary judgment. That was a hidden abuse not of commission but of omission.

Under either theory of dealer or investor for the year 1979 and 1980 and 1981 the court must rule that the losses which IRS has rescheduled were correctly deducted in the year of disposition.

If she had allowed pursuant to rule, proceedings on taking judicial notice of the federal US District Court opinion, and if needed other proceedings (see **Weinstein's Evidence 201 (03)** at pg 201-44) there would have been no subsequent errors permeating the record and trial following. This was not only abuse of discretion but outright flaunting the "mandatory" word of the statue and pleading.(t-89) Summary Judgment for Petitioner would have removed the cases from tax court docket and no trial been necessary. She committed a second error of a law and fact nature in not letting facts conclusively decided in another case, decide her case. Judge Bratton's opinion was deservedly of such weight and so closely related to the transactions, that she judged it correctly to be conclusive but incorrectly omitted it.

Tax treatment in harmony with this judgment and opinion would have been the ideal resolution, combined with what had transpired under Miller, Gilbert and Congress' investigation of the corner. -- - Grason Elec. V. Sacramento Muni Utility Dist. 571 f supp 1504 It would protect the government as under tax laws, the government would collect tax on the recovery when is was proven, that there was a corner. She was required to use the evidence persuasive on the issue and to apply those common facts to the law, to resolve the case. Error in NOT RULING on the mandatory request for judicial notice was made and prejudiced the rights of petitioner in handling the case. Going forward from there, is a record permeated with error and abuse. She further misused procedure in not determining that there in fact were no issue to go to

trial on that had not been decisively determined as a matter of law by the Miller, Gilbert v CIR, supra, ruling of the en banc tax court applying the wording of the written statute. She continued to error in disallowing petitioner rulings on his motions properly submitted which went to the experts IRS consulted , and admissions and other pre-trial work. She allowed no attorney authority to properly process the suit. Instead she is seen (t-26,27) dumping many motions on petitioner as trial started, which never appear in the record.That is covering up the abuse. Other Judges moved on in concert with the en banc ruling--- King v CIR cch commodity futures reporter, 23,392; tax court cch 43,520, 87 TC?? -and those who were dealers in the commodity market, and

had been dragnetted into court, were released.

She took the clear wording of the statute as regards dealers presumption and trashed it. Her opinion wrongly stated four years after trial was that buying and selling metal on the exchanges is insufficient in itself to qualify as a metal dealer. He must have "some separate trade or business apart from the commodity futures transactions themselves"(pg 29 (568). Such was not the law (CEA sec 2,3) or practice per Teweles, in 1979. It was not what Congress intended in its statement to presume dealers. It was not what chairman Rostenkowski as reflective of Congress intended. The usual merchandising function seen of dealers on a board or trade is "risking capital" in "carrying an inventory" which "they sell" from.

This merchandising function Congress has so defined in the CEA which she judicially noticed.

And one does not have to go looking about for customers as implied. Any farmer or merchant, can go to the auction market and instantly sell their commodity, or buy more for delivery with theirs to someone on that exchange or elsewhere. All dealers are not huge multi-national integrated operations. That is one of the main features of a central auction market in our economy. To hold as she has that he had no customers pg 31 (570) is clearly erroneous. It cannot be reconciled with the law or fact. The contract is not the same as securities. One undertakes to deliver metal to a customer. Michelson maintained an office in a commercial building, and delivered metal under the

contract from commercial warehouses where he stored his inventory. That is the trade practice required of dealers despite opinion on pg26. (565).

This court must order as a matter of law, the record conformed to the proper precedent, Miller , Gilbert, v CIR, and order in favor of petitioner as the proper remedy. The Court of Appeals ruling herein will overrule the TAX Court en banc ruling, Miller, Gilbert v CIR, supra , as applied to the year 1979, and therefore should be done with only the utmost certitude and in circumstances that clearly reflect that and the intent of CONGRESS. It is a central reason why we request an en banc hearing. We are convinced it should not be allowed to override Miller, Gilbert v Cir.

-point 4

Congress was clearly aware that there were peculiar problems in the silver market from the corner in the market, by its own investigation, CEA sec 21, as well as in the treatment of the "silver tax straddles" issues. Congress was aware and the trial court was made aware, of the thousands of legitimate business who dealt in silver or silver futures contracts who were injured by what was a corner. Congress clearly knew and intended those businesses to take those losses in the ordinary course of their business "in the year of disposition" (see above statute). And when any judgments were forthcoming because of anti-trust violations, take the recovery in as ordinary income. Michelson took advantage of these proceedings in filing his suit in July 1983. The lower Court improperly ignored

Congress' intent despite taking Judicial notice of it as expressed in Rep. Rosenthal's Congressional report on the corner, and having been a participating Judge in the **Miller, Gilbert** v Cir case. It is clear she is incorrect at pg18 (557) in her determinations that the 1982 judgment she should have judicially noticed, "was not an adjudication on the merits" as it is she is incorrect in her further treatment or use of it. It was error to have ignored the final judgment of a directly related matter in the US District Court. Judge Bratton was not sitting in a vacuum. He had considered the case two years, and at that point was aware of Congressional investigations and other suits and other claims. He also had ruled against joiner of conspirators in the corner. He ruled against fraud, fiduciary duty and several other contract

claims, awarded judgment on the debit in the account, and dismissed the rest. One must conclude that all the transactions were closed, and that would have gutted the issue as noticed. It went on appeal because the conspirator's would not be joined in the suit, and was ruled final. A suit was started in July 1983, and that was what was going on in 1986, and eventually dismissed.

Those who had been cheated by the corner and who might file suit from the Congressional investigations to recover their losses were not in 1979 subject to the consideration of whether or not they might recover. Recovery was almost exclusively taxed when it was received. It wouldn't interfere with claiming damages in a law suit. Excluding damages from the year in which they occur, because a lawsuit is filed for their

recovery of a different nature is wrong on the part of IRS. That concept was not in 1979 developed in case law or properly applicable to the transaction taken in the ordinary course of the business. Sufficient evidence of consideration of recovery and treatment of recovery in 1979 is in the record to sustain petitioners burden, contrary to the statement it was not.

Because no lawsuit existed of any kind in 1979 to recover from, it was error to conclude same. Because petitioner was sued in 1980, the initiative of recovery was not his choice. And because all parts of the case were finally adjudicated either by ruling or dismissal, no recovery was made or existed from that suit. Instead of conforming results seen in that result through judicial notice, and in fairness

of treatment to petitioner, rulings opposite are seen. All these excuses for disallowance of damages comes years after and could not have been a basis for consideration at the time of filing the return.

As Judge Parker sees it, Minpeco, in a rather famous case Minpeco v Hunt, et al. could be recatagorized in 1983 for 1980, as not having had the 500 million dollars in silver futures transpiring that year, because in 1986 IRS found that in 1980, Minpeco had filed a suit and had a prospect of recovery in anti-trust damages. This would increase Minpeco's income 500 million dollars, in 1980, and their taxes 250 million, and then 250 million or more in interest and penalties. The government can grab the whole 500 million recovery claimed, whether or not Minpeco was

successful, instead of properly taxing it in the year of recovery. That is not the proper application of section 165 purpose, and it interferes with the process of law. Also, it shows room for blatant abuse of one taxpayer which IRS chooses to single out for 165 treatment, while the others are treated by taxation in the year of recovery. What about disallowing those transactions taken in hedging which were closed at a loss by, Moccata Metals, Englehard Industries, and others. The latter as a broad matter of law is of concern to this court.

Also, at one point in trial she accused petitioner of trying the corner case here, and in her opinion writes at pg 11 (550) "Petitioner devoted much of the trial time to the details of this attempt." Contrast this with what she writes 21 pages later. "Petitioner has

failed to sustain that burden. The record contains little information about the litigation between Merrill Lynch and petitioner." pg 32 (571) Clearly she writes words that suit the situation not what is in the record. The holding is clearly erroneous. She was given evidence sufficient to the fair treatment of the issue; that anti-trust lawyers knew that damages from the 1983 suit, would be from the predation of the corner damaging the business and from the artificial price. In computing damages this way you take the price paid for silver and deduct the "fair " price the court establishes, and the difference is the excess price paid. Damages are that price times the number of ounces purchased in the infected market. This would not relate at all to those transactions in gold disallowed in 1980

under the ruse of "recovery", or by traditional treatment relate to any silver ones. Also expert advise at the time of filing was that they were proper in the year of filing. (t-331)

IRS in remaking the recovery issue merely seeks to shift income, create a tax, and then try and collect interest on that amount. Since no prejudice will result to IRS because it collects on anti-trust recovery when received by taxpayer, and it seems obvious that for all of the dealers this court should see these transactions occurred in the ordinary course of selling silver, and are better treated that way. Taxpayer was aware that there was no certain immediate recovery as in insurance proceeds, so 165 was just misapplied or an erroneous view of the section, under the case law, existent in 1979.

The trial Judge errored in disallowing certain transactions taken in the ordinary course of business and because they do not relate to recovery sufficiently, exclusively or in such a manner as is readily ascertainable. pg 25 (544) It was evidential error to not use the judgment from 1982, for what use it was to the trier of facts.(the last use Michelson suggest it be admitted for (t-1030) (pg32 (571), and rule the treatment IRS suggested was misplaced.

Even the Congress was aware of how these losses were being treated by the taxpayers, and agreed. All dealers took them in the ordinary course, as Michelson did herein. About 1985 IRS was starting to complain about investor deductions of "other losses" from salary income, income from lawsuits, and incorporating that in NOTICES as disallowances of

losses from investing in one form versus gains in another type of investing, or as seen here. Thus,there is seen further conflict between what the law on the books was in 1979 and what is proper treatment of a small business damaged in an infected market, and what IRS wants to claim it noticed in 1984, or it tried in 1986.

We think this court misapprehended the standard for review of a "not having met the burden" where much is conclusive and mixed law and fact, and the law is misapplied. Reconsideration is proper.

-Point 5-

Judge Parker errored in not rendering a timely decision after the trial and briefs had been submitted. Several written requests starting a month after briefs were in, urged immediate ruling. This is a procedural error, which

coupled with the other procedural law violations manifest fundamental unfairness, and not due process. . The court should not allow the IRS to take part in this through collection of interest which will amount to over half of the monies being claimed by the government. This Court if it does not reverse, can correct the error by instructing the Tax Court in its computation that equitable considerations disallow any interest or penalty to be computed as being owed the IRS on any back taxes---

-Point 6-

Judge Parker errors in utilization of--- Arkansas Best v. CIR, (1988) 485 US 212 as underlying authority for the ruling she made. Judge Parker was required to rule by law of the case under Miller, Gilbert v CIR, Monfort and Corn

Products v CIR in application of the law to this case looking to tax law for the year 1979 and 1980 and 1981 .

It was error for Judge Parker to hiatus for four year and then misuse a Supreme Court case decided two years after trial and definitely not then applicable to the case because (1) it was not authority cited by respondent in brief or pre-trial and thus was not law of the case. (2) such an metal inventory case is not addressed within Arkansas Best. (3) the bright line of the cases is that the legal instruments in Arkansas Best are securities evidencing ownership of an enterprise, whereas in Michelson the legal instrument was a contract to sell metal for future delivery on a contract market.

Clearly the questions applicable to abuse of "capital gains law" seen in---

Corn Products, inc supra, would not have been seen by the Supreme Court at that time as having any concern because the distinctions had been done away with by Congress in 1986. That leaves it a narrow question of securities held by banks or other investors who claim various use of them in mergers.

Use of this case law retroactively is a misuse that must be corrected. Having no value because it is not on point it is mute on the question of vittating Corn Products. Arkansas Best is clearly not an overriding Supreme Court decision as misapplied to this case. Despite wording excluding inventory applications such as Michelson who had inventories in excess of a million dollars, Judge Parker muddies the water. As she has in her opinion, and IRS counsel has throughout, she side steps

the bright line seen in the cases over the years where the instrument being dealt with is "securities" governed under Securities law, and confuses it with those transactions as in Michelson, Corn Products, and Monfort where the transactions are in contracts for metal or corn or beef. The treatment is consistently different. This same mistake is seen in reliance upon Kemon v. CIR, 16 T.C. 1026 (1951) in her opinion and in trial brief. Clearly proven at trial is the fact Michelson used the contracts to take delivery or make delivery of metal, adding to or selling from his inventory of metal. No more is usually required to be shown.

It is error to ignore petitioner's testimony and documents which show that in all petitioners prior dealings on the exchange he bought metal or he sold

metal.(pg25 (564) And that in entering the contract selling gold for delivery in August 1980 he intended to deliver gold from his inventory which contained gold. And for the silver contracts he entered to deliver silver in 1981 and 82, he intended to deliver silver from inventory when the contracts were due. None of the contract delivery dates came about nor was delivery made because Merrill Lynch acted precipitously closing all his contracts and capturing his working capital which crippled his business. It is important to known that a corner is a predatory devise used or which results in harming other business, to understand the circumstance Michelson was in here. Merrill Lynch, the only contact with Michelson who could harm him in a corner, was held accountable. Merrill Lynch's version of the situation as "he was

committing "financial suicide" was proven wrong in a court of law. In MINPECO v Hunt, et al it was proven the cause was a corner, fraud and racketeering. Merrill Lynch said the same thing about their customer MINPECO, largest producer of silver in the world. Judgment is in this record. Absent Merrill Lynch's action harming Michelson there would have been no losses to his business, or Minpeco's. Absent special circumstances which IRS misapplies here, IRS would be requiring Michelson to file schedule c, and pay tax, and FICA and carry on his business.

It shows no consideration given at all to the corner in the silver market which in fact caused the losses to come about. Absent the corner Michelson would have delivered silver in fulfillment of the contracts in 1981 and 1982, as his plan called for. It is error to not see

it as a continuum of events rather than a fixed event and ignore the testimonial record in these matter which press firmly on the issues.

And the record shows that in the $460,050 from the sale of copper sold on the exchange in early 1979, in some 40 transactions, he delivered metal from his inventory, to fulfill the contract. This is the series of events which triggered the filing of a schedule C. And it happened early in 1979,long before any losses (see CPA affidavit on rule motion to reconsider). Judge's error on this is seen on pg 19 (558) where in a concert to make it appear that Michelson was motivated by consideration of the losses to file schedule c, she states, "After the losses in the commodity futures transactions sustained in 1979 and 1980, petitioner for the first time filed

schedule c's with his tax returns." While there is arguable support it is misleadingly worded and incorrect as to the cause. If there had been no corner and no silver losses, Michelson would have been required to report on schedule c, the material income of almost half a million dollars from metal sales in March 1979. Treatment of his developing business on schedule c after sales started, had been discussed with his accountant in 1978, when certain transactions were started, and when he finalized the hedging agreement with his bank and Merrill Lynch, and when he took further inventory. As she states it, and because one is mislead to think there is no other business than the losses and no other transactions than those before the court, it is error. It is totally contradicted in the record.

And in all those 58 other prior contracts he took metal into his inventory. So the implication seen in page 27 (566) that he was a investor because "the transactions in commodity futures in 1979 and 1980 did not differ from petitioner's earlier commodity futures transactions" is in error. To imply that the purpose for those done earlier was investment is contradicted by the facts above and others.The proper implication drawn from the petitioner's expert accountants testimony, and his own testimony, and the document records is that those earlier transactions were purchases of metal for an inventory of his stock in trade, and the schedule c did not need to be filed until sales were made. The unsupported inference that they show investment is pure rubbish, made up. Even in Monfort IRS argues prior

dealings treated different. While 1992 years requirement on starting a business require more elaborate allocation of start up expense by tax law, that was not the case in 1979. What was necessary to start a sole proprietorship in 1979 was the procedures Michelson undertook. The Court is confused by misapplication of inference to regulation after the years, and hurdles made up after the fact.

She refers in the Michelson opinion to "securities"(pg 24 (563) showing a lack of soundness in her opinion since nothing in law or evidence at trial or in the record remotely supports that view. This court must correct clearly erroneous views which bear heavily on the case law and certainly to the functional use. The law clearly defines "securities" different from commodity futures contracts. If one thinks of stock, he

thinks of things that have intrinsic value and evidence ownership of an enterprize. One is at limited risk. One does not have to select and grade his metal, insure it, store it or deliver it. He does not have to know purity, form, and weight standards or other specifications showing known by Michelson herein. She is wrong to couple the words "securities" with the words "commodity futures contracts" pg 24(563)& pg31 (570) for her own purpose and the court can correct the error and implication to case law misdrawn. Finding Michelson used commodity futures contracts for future delivery of metal from his inventories is proper. Securities has no application. It is proper to consider the purpose the contracts were entered. It is what should weigh heavily. Judge Parker should not have ignored the testimony to that point

and should have admitted the contract---cf. Edwards v Cir 415 f2d 578,582 (1969) Two more errors. Investors have theories of investing not shown here to exist. Investors take seriously that stock represents ownership of the enterprize. They are buying an interest in a business, or evaluating its worth.

IRS's counsel in its brief relies on those cases wherein the legal instruments in questions are stocks (i.e. clearly securities) and the hedging purpose would not be applicable. People cannot hedge merchandise inventories with stocks. As such they do not bear on the case.

The proper review is one of law. Whether or not the Arkansas Best case was overriding Supreme Court doctrine? Un fortunately it was improperly presented, but on this law matter alone deserves en banc review.

-Point 7-

IRS effort to categorize Michelson as not in the business must fail because the IRS ADMITS in its answer Michelson was in business, kept proper records through a CPA, and had a LIFO inventory and made elections proper thereto. Holding them to that admission is not unfair, as it is true and shown by the evidence.--- Auto Owners Ins. v 667 f2d 714 ,8th cir 1981 Not holding them to it ,is error and procedural unfairness exhibited by the trial court. While at briefing, they try to remove themselves from the admission saying business means anything, election of LIFO has a specific inventory meaning which this court should find they were required to know and in fact did know when they answered.

This was overlooked by prior counsel, and a proper subject for review, since it was briefed in the lower court.

-Point 8-

Ruling that "at risk questions" were not a part of the trial was improper. This testimony (t-314-317) is relevant and very useful to clearly distinguish the undertaking of Michelson from those which might be speculative. CEA contracts are instruments which call for delivery of metal, not securities which need no daily or weekly or monthly concern. Many courts have commented on the nature of the instrument and its unlimited risk provision, should the market move against a dealer. This is persuasive evidence that the dealings were not in stocks, or securities. Michelson's testimony shows he made contracts to make delivery of

Exhibit X-31

IN THE UNITED STATES DISTRICT COURT

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

FOR THE DISTRICT OF NEW MEXICO

AUG 12 1982

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, A Delaware corporation,

Plaintiff,

vs.

CIV NO. 80-0095 HB

DOUGLAS J. MICHELSON,

Defendant.

ENTERED ON DOCKET
AUG 12 1982

EXHIBIT #9

MEMORANDUM OPINION AND ORDER

This matter comes before the court on plaintiff's motion for summary judgment on the Second Amended Complaint and Amended Counterclaim. Having considered the arguments, evidence and exhibits submitted by the parties and the entire record, the court concludes that the motion should be granted in part and denied in part. Counts I through VIII and XIII through XV of the Amended Counterclaim will be dismissed. Material issues of fact remain as to the matters alleged in the Second Amended Complaint and Counts IX, X, XI, XII and XVI of the Amended Counterclaim, therefore, plaintiff's motion to that extent will be denied.

Plaintiff, Merrill Lynch, Pierce, Fenner & Smith, Inc., ("Merrill Lynch") brought this action to collect the deficit balance in defendant's non-discretionary commodities futures trading account which remained after the account was liquidated on January 10, 1980. Defendant Michelson is a dealer in precious metals. From October, 1978 to January 9, 1980 he traded on margin in gold and silver futures through an account at Merrill Lynch. His account was liquidated at the peak of an historic rise in silver prices after defendant allegedly failed to meet a margin call. Defendant counter-claimed alleging breach of contract, violation of several

Ex-311

provisions of the Commodities Exchange Act, 7 U.S.C. § 1, et seq. ("CEA"), negligent misrepresentation and fraud, and claims under the Sherman and Clayton Acts.

Counts II, IV, VI and XIV of the Counterclaim are founded upon certain alleged acts of negligence made by Merrill Lynch in servicing defendant's commodities account. Defendant asserts that these acts violated § 4(b) of the CEA. It is clearly the law of the Tenth Circuit, as well as other Circuits, that recovery under § 4(b) "must be based on fraud or willful conduct, and not mere negligence, mistake or inadvertence." Masters Commodities, Inc. v. Texas Cattle Management, 586 F.2d 1352, 1355 (10th Cir. 1978); Commodity Futures Trading Commission v. Savage, 611 F.2d 270 (9th Cir. 1979); Silverman v. Commodity Futures Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977). Accordingly, Counts II, IV, VI and XIV will be dismissed.

In Count I defendant charges that Merrill Lynch intentionally failed to advise him that the risks involved in his dealings with it had changed because of its release to defendant of $575,000 worth of commercial commodity warehouse receipts. Defendant contends that this was a failure to fulfill a fiduciary duty, which operated as a fraud, violating both § 4(b) of the CEA and the rules and regulations of the Commodity Futures Trading Commission. Count V also charges Merrill Lynch with the breach of a fiduciary duty, i.e., the intentional failure to advise Michelson that the initial margin requirements on his contracts could be retroactively raised.

EXHIBIT

Merrill Lynch argues that Counts I and V must be dismissed because no fiduciary relationship existed between the parties, citing several cases to the effect that the fiduciary duties of a broker are limited to the faithful execution of the customer's orders. Shearson Hayden Stone, Inc. v. Leach, 583 F.2d 367 (7th Cir. 1978); Leib v. Merrill Lynch Pierce, Fenner & Smith, Inc., 461 F.Supp. 951 (E.D.Mich. 1978). Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,

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Ex-3iii

337 F.Supp. 107 (N.D.Ala. 1971). Although none of the cases cited by plaintiff considered whether a broker has duties like those relied on in Counts I and V, it is clear that Merrill Lynch has only limited fidicuary duties when dealing with a non-discretionary account. The court finds that they do not include duties which would support a judgment for the defendant on Counts I and V. As to Count V, the court also finds that defendant was advised that Merrill Lynch might raise margin requirements on his existing positions in ¶ 1 of the parties' Commodity Account Agreement which incorporated the rules and regulations of the Chicago Board of Trade. Rule 430 expressly authorizes brokers to set margins in excess of those required by the exchange.

Counts III, VII, and VIII involve Merrill Lynch's alleged failure to issue proper and accurate margin calls. Merrill Lynch has submitted evidence showing that the margin calls it issued to defendant were proper and accurate. Defendant having introduced no evidence to the contrary, summary judgment is appropriate on these counts. (While the testimony of one of plaintiff's employees seems to support defendant's claims of inaccurate calls, this apparent contradiction was later explained by plaimtiff. Defendant has not refuted or questioned plaintiff's explanation.)

In Counts XIII, XIV and XV defendant charges that Merrill Lynch failed to give effect to a three party agreement between Merrill Lynch, Michelson and the First National Bank of Albuquerque ("the Bank"), entitled "Security Agreement--Assignment of Hedging Account." Paragraph 3 of the agreement authorizes Merrill Lynch to call upon the Bank to advance amounts to meet margin calls on Michelson's account. It is undisputed that plaintiff's Corporate Credit Department in New York was unaware of this agreement. That same Paragraph 3, however, also provides that, "Nothing contained herein shall be construed to prevent or in any way limit the rights of the Broker to liquidate the account whenever, in the Broker's

Ex 3 N

discretion, the Broker deems it necessary to protect its interests." Thus, plaintiff was not in any way obligated to resort to the Bank. Furthermore, Merrill Lynch has introduced unrefuted evidence that both the Bank and the Albuquerque Merrill Lynch office which executed the agreement intended it to operate only as an interim measure until the Bank had physical possession of the warehouse receipts which the agreement secured. Summary judgment, therefore, will be granted as to these Counts.

Summary judgment on the Second Amended Complaint and Counts IX, X, XI, XII, and XVI of the Amended Counterclaim will be denied. The present deadlines for discovery and filing of pre-trial motions having been rendered obsolete by this decision, the case will be referred to the Magistrate for ruling on pending discovery motions and setting of new deadlines. In addition, the court has considered all pending motions for reconsideration of the Magistrate's decisions and, with the exception of the motion dated July 27, 1981 which is referred to the Magistrate along with the other discovery motions, finds that they are without merit.

Now, Therefore, IT IS BY THE COURT ORDERED THAT Plaintiff's Motion for Summary Judgment dismissing Counts I, II, III, IV, V, VI, VII, VIII, XIII, XIV, and XV of the Amended Counterclaim is granted. Plaintiff's Motion for Summary Judgment on the Second Amended Complaint and Counts IX, X, XI, XII and XVI of the Amended Counterclaim is denied.

Motions for Reconsideration or Review of the Magistrate's Decisions dated February 20, 1981, July 23, 1981, August 5, 1981, and November 3, 1981, are denied.

EXHIBIT

Chief Judge

metal and his expert,and the law (CEA) and prior practice support that purpose.

Michelson was at unlimited risk being in that business. His bank held him to it. His bankers testimony was that he was fully "at risk" (t-435) i.e. the acknowledgment that a sole proprietor is liable to the full extent of his assets for contracts undertaken. And Merrill Lynch held him to it. Merrill Lynch sued and the court determined(see x-3) that he was responsible under the contract. It is as security for performance of a metal contract that they are able to keep the monies deposited, and for guaranteeing that , that Merrill Lynch is entitled to collect monies advanced. IRS did business also in accepting taxes collected by this business as an employer on its employees under the number they issued to a sole proprietor. Would IRS

hold him responsible as a sole proprietor for those taxes collected? You bet. That is not the same as securities. Ownership of securities is intended to limit liability and a person is "at risk" only for the purchase price of the securities. A investor in stocks is not generally responsible for a thing. It is not the tax courts prerogative to remake the instrument Michelson used in his business into a security. She must take the evidence as she finds it.

Injustice results from improper exclusion of contract evidence at trial and its proper interpretation. A proper review of that ruling is a matter of law. As such it is proper to review it under a plenary standard.

-Point 9-

Was the law misapplied in this case given petitioners appearance at trial,

witnesses and conclusive record offered but where the tax court for bias reasons disallows all offers of evidence and apparently rejects all testimony. Arguendo, Did Petitioner appear at trial? Suppose he had not. The Judgment in negative conclusions and contentions of burdens not being met, could have been written just as it was. That is often the course of things citing Welsh v Helving 211 Us 111, 115, 54 s.c.t.89, 78 led 2d 212 pg 32 (571) Here it is a wrong citation and misapplication of the law herein. A fair trial must provide evaluation on the evidence before it. It is clear in the record this case is not subject to the harsh treatment see or implied from some cases under Welsch v. Helving cited by IRS where no appearance is made, or the issue is sham transactions used to defeat taxes and no

evidence is offered, or narcotics people are assessed income, or protesters who won't file returns or pay taxes are noticed and they reply with constitutional and religious objections and are summarily adjudicated. That is not the case here. The lower court misapplied the law.

The burden of petitioner in cross examination to disprove a negative is very great; too great; so many courts do not expect much if anything in assessing burden, to what overcomes a negative proposition. They view it very lightly under the bursting bubble theory. Anything introduced is sufficient to burst the bubble and shift the burden to the other side to prove it. --- Weinstein's Evidence That is the only burden petition faced in countering the notice contention that he was not a

dealer, or not hedging, or not closed, or transactions not sustained, or not paid interest, ---see Schaffer v CIR 779 f2d 849 (2nd cir 1985) at p858 It is a matter of law in this circuit that the burden was shifted back on all issues to the IRS when evidence was introduced, and IRS then failed to contradict. In light of that and the record as a whole the court should have granted petitioner's contention as a directed verdict, as she should have granted summary judgment before trial. There is no negative evidence produced or it is deminimus. The inference from the notice hardly deserves treatment . If there is an inference from the Notice, brought about by someone with transactions in silver futures contracts during this time of dragnetting accussing them of not closed transaction, and by implication a tax avoidance sham, then

it must be weighed against the vast record contradicting showing Michelson's business. The Judge mistakenly and conviently misused the common fact that most returns contain a small amount of interest income, to blare it across the opinion from prior years. It does not speak to the source of income for the year before the court. Any one with interest income can be said to be an investor. The first is easily overcome by the record showing the transactions were on a regulated exchange and the fact Michelson was in the silver or metal business all his life, he was trained in that and had inventories and was carrying on a business plan. Certainly what he knew about the metal business, and other expert testimony about the cause and his business is persuasive where no sham transaction purpose evidence is adduced.

The second turns taking away his livelihood and lifelong vocation into a fine art Torquemado would have appreciated, because everyone with interest income is an investor. Speculative conclusion from non expert Merrill Lynch employee is inadmissible as a conclusion, unsupported in the record since he relied on a number shown to be opposite, and unpersuasive in view of the inference of bias from litigating posture made up after the fact, wherein it was shown Merrill Lynch gave identical speculative conclusions through the account executive against Minpeco the largest silver dealer in the world. They fogged up their records also, but given the hedging agreement , the anticipatory hedge positions structured for delivery out two years, and various brokers who treated them as hedging it was

unbelievable that they were speculating, as it must be herein, on similar evidence. Expert testimony was necessary to appear to rebut Michelson's tax law and accounting expert, and his economic and market expert.

It is unclear whether Judge Parker rules on all issues for failure to meet the burden or on some, but whichever, it is error and injustice on a large scale..

-Point 10-

Judge Parker ignores no experts for the government despite that being required to overcome the testimony of petitioners experts on matters in which they have been admitted and testified. Proper case law citation was not provided by former counsel and the court did not take it up, as it should have , and to do so on review is proper.

The first question reached was the treatment of the expert any different than not allowing expert testimony? We think the record shows not. She should have respected testimony of an expert on a matter of specialized knowledge, as a trier of fact might. ---Shad v. Dean Witter Reynolds 799 f2d 525, 530,9th cir (1986). also see FRE 702 and see Weinsteins Evidence 702 (02)(03). Either Marron or Dr. Teweles was persuasive.

This court should look to the pattern and trial in the MONFORT v Cir, supra case as it is law of the case and of the circuit. Miller, Gilbert had respondents experts to disprove petitioner's experts. Both show the wisdom of introducing contradicting expert testimony. In Monfort, the IRS produced expert testimony on tax law to support the scheme alleged. Petitioner

herein provided expert tax testimony, and IRS did not successfully rebut it. Petitioner economic expert on commodity exchange operations and practice as to hedging and other matters at issue testified Michelson was a dealer and that the investigation he had undertaken was thorough and sufficient to his judgment. IRS has no valid evidence to rebut the petitioners experts. Nor did they show that the experts did not review the record and what ever he determined necessary to make that judgment.

Implications from a hypothetical question, underpinning Judge Parkers view that Dr.Teweles would have changed his view, if Merrill Lynch did, are clearly erroneous, (pg27 (566) because Dr. Teweles also relied on EF Hutton in how they initially categorized Michelson's account. Also he relied on

the Merrill Lynch hedging agreement. It is just not persuasive by the documents that Merrill Lynch saying some hidden number is going to control the question of account status, especially when it was shown that the identical number at one point, the crucial point, was on the Michelson account, and they had changed it.

As an expert, Teweles, relied on his experience in doing what he determined necessary to make that judgment. Since whether he had done sufficient work to reach an opinion was ask and answered at trial, it is impossible to overcome it by words in the brief.--- In re Japanese Electronic litigation, supra. Proper rebuttal by an expert was need to tell what should have been done that was not done. (see affidavit of Dr. Teweles if you think he changed his opinion knowing

that Merrill Lynch changed theirs at trial, rule 155 affidavit) He was not shown anything that would make him change his view. Saying he did not know the facts is not so. Use of that ruse by the Judge to brush off the views of the expert was incorrect evidence consideration under FRE 702 and Weinstein on Evidence. This court must reverse.

IRS put in their brief a lot of baloney from comments made from the trial attorney, not testimony. Look at their cites in the finding of facts in the trial brief or here. Most all are "to the record" and she mistakenly accepted that. She used a lot of them in her opinion. It is unsupported wrong. The court of appeals must address the expert question herein. If the Judge can just ignore all of the evidence then there is not a fair trail.

-Point 11-

The Court of Appeals was misled to the circumstance of the testimony petitioner would not give.(t-967) FRE 408 prohibits the use of statements made in the negotiations, and anything at that meeting would be within this privilege. IRS attorneys are generally forbidden to testify at trial because it compromises their ethics. Thus no one at that meeting could have testified to the fact, Michelson said, "he was going to win". Michelson asserted the privilege that no words made in negotiation conference should be used at trial, and IRS attorneys agreed to it. Michelson even would not meet with an IRS agent present because right before trial he thought they might try and use it. He insisted it be tape recorded.--- re Evansville Television 286 d2d 65, 70 , 7th cir. and

reflects the kind of bad faith IRS can do. Also the court should avoid proceeding in a way that is the same as having your attorney testify against you.

What was said in a negotiation in 1986 had little bearing or value on the considerations proper to evaluating if recovery was an 1979 issue. They are not proper evidence of that when there is testimony in record of the specific details. There are a lot of things different. He certainly thought more of winning after Congress investigated than before. And he thought less of winning after the court awarded judgment to Merrill Lynch on their claims.

No litigant can be said to have stated something usable herein, such as,"he was going to win a suit" where it is so generic that if he stated much else one would say that he had wrongly filed

the suit. The case law suggesting things necessary for evaluating use of those losses was properly followed. And citations to case law authorities for that issue are improper or absent.

-Point 12-

Tax court ruling consolidating tax years 1979 with 1980 was prejudicial error because it resulted in a trial and rulings which are not based on the evidence, the situation and, most importantly, the law in force for the year in question. Tax court ruling consolidating 1980 with 1981 was error, for much the same reason. Consolidating years resulting in not being able to try the issues before the court for the year in question is a law error. Mnooskins Estate v CIR ca 8, 1950, 184f2d 89. Thus, a plenary standard of review more towards mixed questions of law and fact is

appropriate here.--- Kotteakos v. US 328 US 750 ,66 s ct. 1239,90 led 1557 (1946) Error in notice consolidation and in the motion consolidation was brought out in the lower court but not previously addressed here. Consolidating years is leading to IRS improperly tying other years not before the court and not under the same laws to the ruling herein resulting in a further inequitable situation. The case was not tried under the proper law applicable to the accounting period. That is a question of law.

At the outset it is impossible to tell what is being done in one year consistently with the law and circumstances for that year because the NOTICE was improperly prepared on several years which each year deserved its

separate notice, hearing and consideration.

Because of the above and clearly see in the record and ruling post trial on the rule 155 motion a fair trail was not had and this court must reverse. The court need only review the lower court error in improperly evaluating under motion 155. Because one still cannot determine what the return for 1979 should have looked like from IRS's submittal, and because it impliededly rejected rendering by tax experts KMPG Peat Marwick, out of hand, which is clear to every item as the return should have been prepared, under the courts theory, it is injustice.

Review cannot determine if pursuant to **Miller, Gilbert,** supra, the losses were allowed in the year of disposition. Even as an investor in 1979, the

petitioner is allowed to deduct capital losses from capital gains and any more from ordinary income as the law provided. The 155 rule computation SHOWS that is not the case and that you cannot determine with certitude from the IRS submittal how the return was in fact treated. It is incorrect and this court must remand for the Tax Court to order it corrected even under the affirmation mandate. Rather, it should recall that mandate and give a new trial.

-Point 13-

Judge Parker was biased.--- Ward v. Westland Plastics, inc 651 f2d 1266, 1271, 7th cir (1980) In her dissent in Miller, Gilbert v Cir, supra is seen a frustrated and reckless position, not reflective of the circumstance and what Congress intended. In the abuse seen in this record is an extension of those

frustrated thoughts. The opinion in this case is a tortured and deceptive and wrongminded writing.

One needs also to look to the fact of bias seen emanating from the fact that she was one of the few women making it through the ranks of the IRS. And that she served them so well there, that she became their advocate here. IRS counsel did not have to raise points, as she prosecuted for them. More wrong doing and failure to correct it, is seen in the court record in her clerks actions against and disrespect to the litigant. IRS kept people in the room after the witness rule was invoked. IRS conducted ex-parte communications with the Judge. That everything was stacked against petitioner was a feeling in that courtroom and a reality. Stationing armed Marshals in the court room was wrongly

used to intimidate petitioner at a stressful time. The litigant was mocked and the trial attorney scorned. IRS did not have to present experts to rebut petitioner's expert because it was a case not decided on the evidence adduced at trial but fixed by IRS before. Such arrogance was uncalled for. This was properly raised in the trial court, and was a proper subject for review.

She felt it necessary to uphold the misconstrued cases and procedural error from the female attorney for IRS because she might be viewed as her mentor, or role model. Favoritism is seen in her salvation of the female IRS attorney from a faux pax which clearly showed the IRS misissued the notice. She verbally beat up Mr. Michelson instead, and said it was all judicially noticed. (t-1037)the government did it right.

Lastly in the overall view of what IRS was doing in concert with the agreeable judge is a very real problem when the lawmaker Congress is ignored. She was not going to let this metal dealer get what Congress intended.

Appellant is aware that the appeals court does not want to hear screaming on the bias of the lower court Judge , yet one must honestly present those errors in this Court, and point out the reason for them. That makes the appeal procedure effective. That is all that is intended here. The judgments and ruling and treatment proceed from a definite bias, not from the cool reading of the evidence. Not from a proper application of the law. Not from a fair trial. Ordering a new trial and trial Judge is proper. ---?

-Point 14-

It is impermissible to allow IRS to determine the right of taxpayer to engage equally in the occupations of the community--- Traux v. Rarch 239 US 33, 36 s ct. 7, 60 led 131 (1915) It is impermissible to allow IRS to determine the right of taxpayer to be a dealer in metal .

It is uncontroverted that Michelson spent a normal working day at the occupation of a dealer in metal, had a college education fitting him for his profession and years of experience in metal buying and selling. It is improper to allow the IRS to come along after a number of years necessary to set up the occupation and through their ruling disallow his participation in that profession. see Faulkconer v Cir and other , supra. It has material and psychological effects that deserve

consideration. FICA, medicaid, insurance and other things turn on being a dealer in metals. It cannot wrongly and arbitrarily take them away as done herein.

Our economic system demands that there be free entry and exit to the market. IRS being able to determine arbitrarily if one can be in business at that level is an improper trade barrier in a free market system. The Judge finding that something else was necessary is opposite the conclusive evidence of record seen in the CEA, and of the expert. The job of middleman is always in flux. Some business are more integrated than others. And it certainly is opposite the best evidence in the testimony of Michelson. The opinion of p27 (566) that he "concoct(ed) a trade or business out of his commodity futures transaction" is

just vilification, in these circumstances. Did the Department of Labor concoct that standard industrial classification also?

Traux v Rarch, supra, is fundamental to the right to elect to be a merchant in metal. Metal merchants are common merchant occupations in every community, from dealers at the head of the middleman chain, to fabricators, to scrap metal dealers at the other end, they are a valid occupation. How they go about trying to earn a living is best left to them. Other tax authority used in the trial brief also support the position. IRS is removing Michelson right to be in a business just as certain as if a licening board removes his license. Mistreatment under the tax law is more certain.

-Point 15-

exhibit X-4

BUREAU OF LABOR STATISTICS
INDUSTRY VERIFICATION FORM
ALL INDUSTRY

U.S. DEPARTMENT OF LABOR

This information collected on this form by the Bureau of Labor Statistics and the State agencies cooperating in its statistical programs will be held in confidence and will be used for statistical purposes only.

This report is authorized by law 29 U.S.C.2. Your voluntary cooperation is needed to make the results of this survey comprehensive, accurate, and timely.

Form Approved
O.M.B. No. 1220-0032
Approval Expires 12/31/85

This report will be used to ensure the proper industrial classification of your regular QUARTERLY EMPLOYER'S TAX REPORT and should cover the entire activity of the same establishment for the most recent calendar year.

WHOLESALE MARKETING OF FERROUS & NON-FERROUS METAL SEMI-FINISHED PRODUCTS (BARS, INGOTS, SHEETS, WIRE, FORGINGS, NAILS, ETC.) WITH OR WITHOUT WARE-HOUSES (METALS SERVICE CENTERS).

TO AVOID DUPLICATE MAILINGS, Please return as soon as possible in the enclosed envelope, to the address below

NEW MEXICO EMPLOYMENT SECURITY DEPT.
ACTUARIAL RESEARCH SECTION
P.O. BOX 1928
ALBUQUERQUE, NM 87103

TELEPHONE NO. (505) 841-8696

BLS 3023-01 (Rev. Sept. 1983)

A. Does the description to the left include the principal product, activity or service produced by the establishment(s) covered by the Unemployment Insurance number specified below?

1 ☒ Yes - Skip to question C. on the reverse of this page

2 ☐ No (or if unsure) - Continue with question B. on the reverse of this page

OFFICE USE ONLY

1972 SIC	Ownership	County Code	Aux.
5051	5	001	

Please complete this report for the establishment(s) covered by the Unemployment Insurance number below.

UNEMP. INS. # 06-8104-1

MICHELSON D J
MICHELSON METALS
1503 CENTRAL AVE NW
ALBUQUERQUE NM 87104

EXHIBIT
18.

(18)

Judge Parker ruled improperly that the US DEPARTMENT OF LABOR which categorized Michelson's business as one of a dealer in metal, was inadmissible.(x-4) This is one of the many rulings against all documentary evidence. It is proper for the appellate Court to review that ruling of the tax court because it may have misapprehended the situation seeing that the court order, showing Michelson was a metal dealer, was the only documentary evidence which the lower court did not allow, or which she ignored. It was not. And prior appellant counsel errored in not clarifying it for the court. We ask for a proper review of the record under the standard of review of inadmissible abuse and consideration for multiple or cumulative error.---see Graham v. Graham v Wyethe Labs, div of American Home Pdts

corp 906 f2d 1399, cert denied 11 s.ct 511, 112 led nd 523 where for numerous evidentiary errors a new trial is given.

It is not necessary to bring before the court the Secretary for the Department of Labor to show that his department categorized Michelson in Standard Industrial Classification 5051 , which is as a dealer in metals. That is the normal job of that department. It is competent evidence of that fact, and should be unquestioned that it is reliable. It is a business record. Another view of the conduct of petitioner's metal business from a source considered reliable. This evidence showing the niche of commerce which Michelson filled was wrongly not admitted and was very persuasive of the fact of being in that business.

Her ruling on inadmissibility of the document because it was from 1983, was wrong. The fact that the form presented at trial was from 1983, rather than the one they issued in 1979, should not be controlling, as he testified that one had been issued in 1979, and that it was the same business engaged in 1979. He offered to bring the other year. That should tie in sufficiently to the year before the court. Also, the fact that the IRS wants to tie 1983 to this result is indicative of the usefulness of the evidence in determining Michelson to be a dealer in metals, as well as shows no disadvantage to IRS. It should have been admissible for inference that in 1983 Michelson was a dealer in metals and it was likely he was in 1979, if he says he was, and because Department of Labor will not misclassify people or do that for

investors. Other evidence in the form of petitioner's testimony shows that Michelson undertook the responsibility of the business and filed the proper State and other license and tax procedures of a small business. Additionally his phone and yellow pages was to a metal dealer; his stationary and cards were of a metal dealer; his banker was a specialist in small business who entered a hedging agreement to finance his metal business; other businessmen viewed him by virtue of his education, experience and conversations as in the metal business. All of these testified in evidence from 1979 show him to be a dealer in metals. All his assets were committed to the business. This kind of evidence, in view of the Faulconer v IRS, supra, criteria is conclusive. Judge Parker ignored proper criteria under case law in

evaluating the issue. It is far more likely than not that Michelson was a metal dealer, given little to draw a negative inference on. Proper criteria under case law is a law question reviewable for more probable than not an error was made.

-Point16-

Judge Parker offered the excuse in her opinion to one of her wrongful document evidence ruling, that the US District Court opinion was only description. This is an improper evidence ruling under the trial citation. The evidence burden seen under the trial citation Lehrman v Gulf 464 f2d 26, cert denied 93 s ct 687, 409 us 1077, 341 led 2d 665 (see front for entire cite) , also see Paterson v. Gaines (1847) 47 us 550, 598 12 led 553. * is whether Michelson viewed within the community can

be seen to have been engaged in that business, and whether this piece of evidence would make it more probable or not. Since it is reliable evidence almost conclusive of the fact that Michelson is a dealer in metals, it was relevant. She admitted it was central to the issues she was going to resolve, but then said it was irrelevant, and therefore inadmissible. (t-89) This is arbitrary action if there ever was.

A year before trial petitioner submitted a mandatory motion to take judicial notice of the court Judgment and opinion wherein the Federal District Judge found "Michelson was dealer in precious metal." She refused to act under the mandatory (FRE 201 d) ruling having all the facts at hand. That was error. She would not act on trial date, under a relevant criteria. And later and

at the end of trial under any criteria.(t-1030) She would not correct it at briefing. This court should correct it in review. Judge Bratton in his judgment and opinion decided on the same issues, just as if he gave testimony in court. It is wrong to think that a judge must be brought before this court to make that relevant fact known. The court opinion offered is evidence of those facts reasonably within it. She was made aware of through Michelson's testimony, that the court had ruled Michelson a dealer and included it in the judgment as an answer to whether it was hedging or not. Only dealers hedge. She states further within her opinion that this was still an ongoing dispute with Merrill Lynch, pg 5 (544) which it was not in 1986. It was not just some idle description. And it was supported by many

of the documents presented here which were presented at the Federal Court proceeding, such as the hedging agreement. The Federal Judge had to address the entire issues behind the contract undertaking. He had to review what went behind the account agreement, the hedging agreement, and the undertaking. The Federal Judge should be accorded respect due him by IRS which is an Agency of the Government, and conform their findings on essentially the same transactions to his view.

It is evidence for several things and deserves more weight than her ruling disallowing the introduction allowed. Since it was ruled inadmissible the court must reverse. .

-Point 17-

Legal error in judgment and non application of the rules of evidence is

Ex X-5

4552-1765

EXHIBIT 5.

SECURITY AGREEMENT
ASSIGNMENT OF HEDGING ACCOUNT

WHEREAS, the undersigned, Douglas J. Michelson, hereinafter called the Debtor, whose address is 1005 Gold Ave., S.W. has a commodities account (No. _____) with the firm of Merrill Lynch, Pierce, Fenner & Smith Incorporated, brokers, and dealers in securities and commodities, hereinafter called the Broker, which account is serviced by Broker's branch office located at 225 Gold Ave., S.W.; and

WHEREAS, Debtor is now indebted to First National Bank in Albuquerque hereinafter called the Secured Party, located at 40 First Plaza, N.W., Albuquerque, New Mexico, and expects to incur additional indebtedness to the Secured Party for the purpose of financing commodities hedging transactions in _____ [redacted];

NOW, THEREFORE, it is agreed by and between the parties hereto as follows:

1. As additional security for the obligations of the Debtor to the Secured Party, and for the payment of all sums which the Secured Party has loaned, or may hereafter loan or advance to the Debtor, the Debtor hereby grants a security interest in and assigns and transfers to the Secured Party all funds which may hereafter accumulate or become withdrawable from or paid out of the account of the Debtor with the Broker, including any balances which may remain to the credit of said account upon the closing thereof; except, however, to the prior payment of all indebtedness of the Debtor to the Broker, as such may exist from time to time in any account of the Debtor with the Broker, including, but not exclusively, which may have been incurred in connection with Debtor's transactions with Broker, and further subject to the Broker's lien and the right of foreclosure thereof in connection with any indebtedness of Debtor to Broker (including, but not limited to, any right of the Broker to close out open positions of the Debtor without prior demand for additional margin and without giving notice).

2. The Secured Party is hereby authorized and fully empowered, without further authority from the Debtor, to request that the Broker remit to the Secured Party any funds that may be due to the Debtor; and the Broker is hereby authorized and directed to pay to the Secured Party such funds as the Secured Party shall request on demand of the Broker that may hereafter be withdrawable or payable out of said account of the Debtor with Broker, without the consent of, or notice to, the Debtor. No funds are to be withdrawn by the Debtor from the said account without the Secured Party's prior written approval.

3. If, at any time during the continuance of any commodities account or contract in Debtor's account, the Broker may require additional margin with respect to such account or contracts, the Secured Party will, promptly, but in no event more than two business days following the Day of Nonclearance, advance to said Broker on behalf of the Debtor such amounts as may be requested by the Broker or under appropriate liquidating orders, provided, however, that the Debtor shall at all times remain liable to the Secured Party for any amounts so advanced pursuant to the terms of any agreement entered into between the Secured Party and the Debtor in connection with the transactions covered by this Agreement and Assignment. Nothing contained herein shall be construed to prevent or in any way limit the rights of the Broker to liquidate the account whenever, in the Broker's discretion, the Broker deems it necessary to protect its interest.

4. The Debtor hereby covenants and appoints the Secured Party as true, lawful and approvable attorney to demand, receive and endorse payments and to give receipts, releases and acquittances for all moneys payable to the Debtor, and this may be done in the name of the Secured Party with the same force and effect as the Debtor could do but this Security Agreement not been made. Any and all moneys or payments which may be received by the Debtor, or which the Secured Party is entitled under and by reason of this Security Agreement, will be received by the Debtor as trustee for the Secured Party, and will be immediately delivered in kind to the Secured Party without commingling.

5. Nothing herein contained shall be construed so as to prevent the Debtor from receiving the credit, subject to the control of the Secured Party as it may appear, of the account with the Broker. Until the Secured Party shall in its discretion and thereon notice of such election in writing to the Broker, the Debtor may make such additional transactions in his said account with the Broker as the Broker shall be willing to accept for execution. In the event the Secured Party does make such election and does deliver such notice in writing to the Broker, the Debtor shall not thereafter execute any transactions in said account and the Broker shall not accept for execution any such transactions without the concurrence of the Secured Party, except transactions in liquidation of any then outstanding commodity or commodity future positions. Upon receipt by the Broker of notice of such election and if directed by the Secured Party, the Broker will, attempt to promptly cancel any open orders which had been entered by the Debtor but had not yet been executed at the time such confirmation is received. If the Broker is unable to cancel such orders before they are executed, the transactions will be considered valid and binding on the Debtor and the Secured Party.

6. Whenever the Secured Party deems it necessary for its protection, it shall be entitled, without the consent or concurrence of, or prior notice to, the Debtor, to direct the Broker to liquidate any or all then outstanding open positions in the Debtor's said commodity account and to direct the said Broker to pay to it, the Secured Party, the credit balance as shall exist in the said account after such liquidation and after the payment to the Broker of all indebtedness of the Debtor to the Broker.

7. Any sums paid by the Broker from the account of the Debtor to the Secured Party under this Agreement shall be paid for the account of the Debtor and applied by the Secured Party to the payment of any indebtedness, including principal and accrued interest, then owing by the Debtor to the Secured Party. The balance remaining after the payment of said indebtedness shall be paid by the Secured Party to the Debtor. The receipt or receipts of the Secured Party for such funds so paid to it by the Broker shall be to the Broker expense to the receipt of the Debtor as fully and to completely as if funds had been paid to the Debtor in person and receipted for by the Debtor.

8. The Secured Party is hereby authorized and empowered to receive from the Broker, and the Broker is authorized and directed to deliver to the Secured Party, for its information, copies of the following written communications of all contracts executed for the account of the Debtor, monthly statements and purchase and sale statements of the Debtor, margin calls sent to the Debtor, notices of liquidation sent to the Debtor and copies of any written communications pertaining to said account which may be sent to the Debtor from time to time.

9. As between the Debtor and the Secured Party, this instrument shall remain in full force and effect until cancelled in writing by the Secured Party, or by the Debtor when and if the Debtor no longer is indebted to the Secured Party. Any cancellation of this instrument shall be without effect as to the Broker until receipt by the Broker of written notice from the Secured Party covering the terms of the termination of said Agreement.

10. The Debtor hereby represents and warrants to the Secured Party that the account or accounts above assigned have not heretofore been assigned or assigned.

11. This Agreement shall be binding upon the Debtor and upon his executors, administrators or assigns and it shall be binding upon and inure to the benefit of any successors of the Secured Party and the Broker.

Dated this 23 day of February, 1978

Douglas J. Michelson	First National Bank in Albuquerque
Secured Party	Debtor
By _____	By _____
(Title)	Frank Sanchez, Assistant Vice President

ACKNOWLEDGEMENT

To (Secured Party—Name and Address)
First National Bank in Albuquerque
40 First Plaza, N.W.
Albuquerque, New Mexico

Merrill Lynch, Pierce, Fenner & Smith Incorporated whose branch office is located at 225 Gold Ave., S.W.
Albuquerque, New Mexico
hereby acknowledges receipt of a copy of the above mentioned Security Agreement and Assignment and agrees to abide by the terms and conditions thereof to the extent of an obligations as the Broker described therein. No previous assignment or claims against the above described account or accounts have been received by the undersigned.

Dated 2/24, 1978 By _____
(Officer—Title)

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seen wherein the document (x-5) Hedging Agreement and the purpose therein , is ignored as if it did not address the issue of the conduct of business between taxpayer and his broker and bank. It did.--- Southwest Grease and Oil co.v US 308 f supp 107 (1969), 117. One can only see the contract as being consistent with a dealer in metals, as that is who conducts hedging. It cannot be seen in any way as pertaining to securities, or investors.

Another point she ignores is the testimony of the expert that the method and practice of Michelson was right according to the rules and regulations of the Commodity Exchange Act which sets standard and purpose for hedging. She ignores trade usage and custom Wigmore #2440. pg 6 (545) that most dealers in that market hedge in the identical manner

and are consistently sellers. And ignores documentary proof that his named appeared on the list with other dealers.(t-202)

-Point 18-

Michelson chose on the 1979 tax return to list his occupation as a "dealer in metals". The Court of appeals has been wrongly referenced to previous years tax return (1978) to determine the occupation of Michelson. While this one statement made on a prior year return is evidence, we do not think it should be admissible as those returns being admitted into evidence was contested (t-59). And it is not of sufficient weight and is contradicted, so that it cannot serve as record enough to say that was what he was in 1979. Since it does not speak to the year the Court addresses, and something else does persuasively, this court cannot allow the lower court

to use it as evidence at all let alone sorely sufficient to support the finding that he was not a dealer in 1979. That would contence the ruling error of the lower court.

It would speak very weakly if at all to the year 1979, since petitioner can change his occupation statement at least yearly. And really he can change it anytime within that year. It would not speak to the year 1980, as the prior year to that the answer to the same question box is that the prior year was listed as " a dealer in metals". The same is true of the year 1981.

-Point 19-

Judge Parker improperly applies the parol rule of evidence (Wigmore on Evidence #2425) to language in the document Hedging Agreement (x-5) which details the purpose and procedure for

conducting business between Merrill Lynch and Michelson and the First National Bank. This court must review and reverse since standing alone the document is conclusive to the issues.

The hedging agreement(x-5) details the purpose of the dealing. i.e. to "finance commodity hedging transactions in metal contract." Hedging agreements were found at both brokers at the time, EF Hutton, and Merrill Lynch, and testimony at trial supports that there was a trade account opened later at Dean Witter. Existence of those agreements excludes the possibility that the account was an investor or speculator. Merrill Lynch cannot be said to now come and say through Armstrong that it was speculative, because in 1978, through their manager signing this document, they concurred that the purpose to be hedging.

This was considered by the the US District Court and was important to his finding "that Michelson was a dealer in precious metal."

This testimony of Armstrong is the only pretext of evidence she has which underlies the idea of speculative. It is improperly weighted under the parol evidence rule. The document should govern Merrill Lynch's testimony, not the words of an account executive after they were ensnarled in litigation.

Since the lower court in briefing was presented the issue of ruling on this, she was required to rule and this court required to review the ruling or lack of it, and apply parol rule itself.

After finding that the account was apparently opened as a trade or hedging account, rather than as a speculative account. (pg 4) she switches around to

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find in a footnote on page 6 that she "finds that in 1979 and 1980 petitioner had a speculative account or at least was using his account to speculate." This was determined in 1986 by asking the people petitioner was litigating against. She ignores his account at EF Hutton which was a hedge or trade account in which over half the business was conducted, and which the expert said he relied on also. She ignored the testimony of the EFHutton account executive that it was hedging in a trade account- that metal was delivered. And she ignores the most reliable evidence which is the contract and it contained the totality of the understanding of the the relationship. The existence of the hedging agreement undermines the judgment in such a manner that it must be reversed.

-Point 20-

Judge Parker was blinded to the commercial significance of the corner and its predatory character. Thus she was not listening to what happened to one small dealer in that market who had his business nearly destroyed by it. She wanted to only see the transaction in the context she brought to trial and get this silver tax straddle abuser, if only she can by pass **Miller Gilbert.**

She missed the gestalt of the overall inference--cf Duberstein v Cir 363 US 290 by failing to see the continuum of events as early as 1978 where a small businessman was going about setting up his business. Can all those good people be wrong in their assessment of Michelson as a dealer. The experts, the banker and the brokers, the accountants, and the other business people. The documents in the normal

course of business. Can the government be doing such a bad job in all the other departments that there records are to be disbelieved. The District Court, The Department of Labor, the Commodity Futures Trading Commission, The State and local governments ? Yet her reply is that "they are not determinative for this court for tax purposes." At some point she should have taken to the Judges job of harmonizing the tax laws. And we believe it was her duty to have done that in subordinating the issue to the findings of the District Court, and allowed Judicial Notice so summary judgment could have been moved. Surely after **Miller, Gilbert** it was clear that for 1979 Michelson is presumed to be a dealer and to have sustained those losses in the year of disposition.